

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 575 (Sub-No. 1)

DISCLOSURE OF RAIL INTERCHANGE COMMITMENTS

Decided: May 21, 2008

We are amending our regulations to require that parties seeking to obtain an individual exemption for, or to invoke a class exemption covering, a transaction involving the sale or lease of a railroad line identify any provision in their agreements that would restrict the ability of the purchaser or tenant railroad to interchange traffic with a rail carrier other than the seller or landlord railroad. Our new rules also provide a procedure whereby a shipper or other affected party may obtain access to such provisions. The new rules are set forth in the Appendix to this decision.

BACKGROUND

By petition filed on March 21, 2005, in STB Ex Parte No. 575, the Western Coal Traffic League (WCTL) renewed its earlier request that the Board initiate a rulemaking proceeding to consider regulations proposed by WCTL for restricting contractual provisions included with a sale or lease of a rail line that limit the incentive or the ability of the purchaser or tenant carrier to interchange traffic with a rail carrier other than the seller or lessor railroad.¹ WCTL asked the agency to establish a rebuttable presumption that such provisions, which we refer to as “interchange commitments,”² are unreasonable and contrary to the public interest if they (a) last longer than 5 years, (b) include any financial penalty for interchanging traffic with another carrier, or (c) include a credit for interchanging traffic with the seller or lessor railroad that would provide a return in excess of the railroad industry’s cost of capital. We obtained public comments on WCTL’s renewed request and also held a public hearing.

¹ WCTL first made its request in 1998 by petition filed in STB Ex Parte No. 575, Review of Rail Access and Competition Issues, an umbrella proceeding to examine various issues concerning competition between railroads. By decision served on March 2, 1999, the Board deferred action on WCTL’s petition in order to allow the rail industry to gain experience under a then-recent agreement between large and small railroads, known as the Railroad Industry Agreement, which established a process involving the enforceability of certain such interchange commitments.

² Many opponents of such provisions, including WCTL, refer to them as “paper barriers,” but the Board has applied a broader and more neutral term to identify those contractual provisions that affect interchange capabilities or incentives.

In a decision served on October 30, 2007 (the October 2007 Decision), we concluded that the propriety of an interchange commitment is best considered on an individual, case-by-case basis, and we therefore declined to adopt rules of general applicability regarding the use of interchange commitments. While we did not prohibit the enforcement of existing interchange commitments across the board, we stated that affected parties may attempt to show that a particular interchange commitment is causing, or would cause, a violation of the Interstate Commerce Act. We further stated that we would apply a higher level of scrutiny to proposed interchange commitments that would totally ban an interchange or that would continue in perpetuity. To facilitate a more informed case-by-case analysis of interchange commitments, we proposed regulations that would (a) require carriers, when seeking Board authorization for sale or lease transactions, to identify any interchange commitment provisions, and (b) provide a procedure whereby shippers or other affected parties may obtain access to such provisions, when participating in authorization proceedings or challenging the continued application of existing interchange commitments. We docketed the proposed rules for consideration in STB Ex Parte No. 575 (Sub-No. 1) and requested comments on them in a separate notice published in the Federal Register on November 2, 2007, at 72 FR 62200.

Opening comments were filed by: Ameren Energy Fuels and Services Company (Ameren); American Short Line and Regional Railroad Association (ASLRRA); Arkansas Electric Cooperative Corporation (Arkansas Electric); Association of American Railroads (AAR); Marshall Durbin Companies (Marshall Durbin); Transportation Arbitration and Mediation, P.L.L.C. (TAM); and the U.S. Department of Agriculture (USDA).

Reply comments were filed by: Arkansas Electric; ASLRRA; AAR; and The Kansas City Southern Railway Company (KCS).

On January 30, 2008, Marshall Durbin filed a reply to KCS's reply comments. Marshall Durbin's pleading contains a request that we accept it. We will grant Marshall Durbin's request, which is unopposed, in the interest of developing a more complete record.

DISCUSSION AND CONCLUSIONS

After considering comments from the parties, we are adopting the proposed regulations with two changes.³ First, we are clarifying the extent to which need must be shown to obtain information about interchange commitments for use in Board proceedings. Second, we are adding deadlines for (a) replies to motions for disclosure of the terms of interchange

³ The Board requested comments on the disclosure rules proposed in STB Ex Parte No. 575 (Sub-No. 1), not on its decision in STB Ex Parte No. 575, where the agency considered the lawfulness of interchange commitments. Nevertheless, several parties have raised issues concerning the agency's decision in STB Ex Parte No. 575. See, e.g., comments of TAM and those portions of the comments of ASLRRA, Ameren, and Marshall Durbin relating to the standards the Board will use to determine the propriety of interchange commitments in individual cases. We do not address those issues here because they are outside the scope of this proceeding and could have been (and in some cases were) raised in STB Ex Parte No. 575.

commitments, (b) Board action on motions for disclosure, and (c) production of the information in response to approval of such motions.⁴ This decision also addresses several other issues raised by the parties.

Draft Protective Order. The proposed rules require a party to submit a “draft protective order” with its motion for access to documents referencing interchange commitments. AAR points out that the text of the proposed rules requiring this submission seems to conflict with language in the October 2007 Decision (at 16) stating that a party should file a “signed protective order” along with a motion for access. AAR asks the Board to clarify that a party needs to submit a draft protective order, rather than a signed protective order, with a motion seeking access to agreements containing interchange commitments. We agree and clarify that a party should submit a draft protective order.

Publicly Available Interchange Commitments. USDA asks the Board to make interchange commitments publicly available, rather than merely to allow their terms to be disclosed privately to the parties to the agency proceeding upon execution of a confidentiality agreement.

Our rules will provide for public notice of proposed new interchange commitments. The existence of a proposed interchange commitment and the affected interchange point(s) will be publicly available when a notice or petition for exemption is filed with the Board.⁵ Given the commercial sensitivity of the precise terms of these commitments, we do not believe that public disclosure of the agreements themselves is warranted. Such commercially sensitive information is typically disseminated through the Board’s protective order process.

Showing Need for Disclosure. The proposed rules generally require a party to show a “need for the information” pertaining to proposed new interchange commitments.⁶ However, we did not include that same language in our proposed rule 1114.30(d), which would apply to proceedings brought by complaint or petition involving the reasonableness of an existing interchange commitment. AAR asks us to require a showing of need in this provision as well.

⁴ We have also corrected a grammatical error in our proposed rules.

⁵ Such information is already required for parties seeking Board approval by application.

⁶ See, e.g., proposed 49 CFR 1121.3(d)(2):

(2) To obtain information about an interchange commitment for use in a proceeding before the Board, a shipper or other affected party may be granted access to the confidential documents filed pursuant to paragraph (d)(1) of this section by filing, and serving upon the petitioner, a “Motion for Access to Confidential Documents,” containing:

- (i) An explanation of the party’s need for the information; and
- (ii) An appropriate draft protective order and confidentiality undertaking(s) that will ensure that the documents are kept confidential.

In contrast, Ameren asks the Board to establish a presumption favoring disclosure by eliminating any requirement to show need. Marshall Durbin asks the agency to eliminate any showing of need beyond (1) the filing of a complaint or a petition to reopen a prior proceeding or a petition pertaining to an exemption and (2) a demonstration that the party seeking disclosure is directly affected by the interchange commitment.

The requirement of a showing of need ensures that disclosure requests for otherwise confidential agreements are considered only when parties seek such information in order to exercise their rights under our governing statute. Accordingly, we will not eliminate the requirement of a showing of need to obtain disclosure. In adopting a need standard, however, we do not intend to make it burdensome for those with a legitimate regulatory need to obtain disclosure. It is our expectation that a shipper or other party affected by an interchange commitment with a colorable claim of a statutory violation will be able to meet the standard.

It was not our intent to establish a lesser standard for access to confidential documents in proceedings involving challenges to existing interchange commitments. As our proposed rules indicated, a person seeking disclosure of an existing interchange commitment (proposed 49 CFR 1114.30(d)) must be a “party to the proceeding” involving its lawfulness. Presumably, a party to such a proceeding likely will have alleged in its complaint or petition a legitimate interest supporting disclosure of the interchange commitment terms. Nevertheless, to eliminate any doubt that a party must demonstrate a need for disclosure in a proceeding involving existing interchange commitments as in other types of proceedings, we will add language to our proposed 49 CFR 1114.30(d) requiring that a “need for the information” be shown.⁷

File Action First. ASLRRRA asks the Board to require persons seeking disclosure to “file an action” at the agency before filing a motion for disclosure. ASLRRRA argues that this is necessary to avoid “fishing expeditions” that do not involve an actual claim or controversy.

Our proposed regulations governing challenges to existing interchange commitments do require that the motion for disclosure be filed “after the initial complaint or petition.” See proposed 49 CFR 1114.30(d). We will not, however, require parties seeking disclosure of proposed interchange commitments to first initiate an action separate from the pending notice or exemption proceeding. Under existing practice, an interested shipper often is forced to assume an early litigious stance, by filing a petition to revoke an exemption, in order to obtain sufficient information about the interchange commitment to determine whether to pursue a challenge. The purpose of our proposed rules is to avoid unnecessary litigation and to minimize discovery expense by providing an expedited procedure to give an interested party information about an interchange commitment early in the process so that it can determine whether to incur the expense of challenging it. This purpose would be frustrated if we were to require parties seeking disclosure of proposed interchange commitments to first file a separate action before this agency. The requirements that an affected party show “need for the information” and that the information

⁷ Similarly, to make more clear that section 1114.30(d) applies to existing agreements, we will revise that section specifically to apply to “an existing rail carrier sale or lease agreement.”

be “for use in a proceeding before the Board” are sufficient to deter frivolous requests for disclosure.

Partial vs. Full Disclosure of Terms. The proposed rules allow a shipper or other affected party to obtain confidential access to a “complete version of the document(s) containing or addressing” an interchange commitment. ASLRRRA asks the Board to require disclosure of only the interchange commitment provisions of transaction documents. According to ASLRRRA, disclosure of the entire agreement would delay and discourage transactions and risk leaking of information.

We will not modify our requirement that a complete version of the documents be provided. Contractual provisions that bear upon the lawfulness of an interchange commitment can be scattered throughout complex and interdependent transaction documents. In order to evaluate the lawfulness of an interchange commitment, the Board and interested parties may need to consider provisions of an agreement (such as those relating to the purchase price or rental payments⁸) that fall outside the clause containing the express interchange commitments. ASLRRRA’s approach would encourage costly and time consuming disputes over which parts of a transaction document carriers could redact prior to disclosure, thus undermining the Board’s goal of expedition. The better way to deter the risk of information leaking is through adoption and enforcement of a protective order.

Deadlines. ASLRRRA asks the Board to set a “reasonable time limit” for ruling on motions for access to interchange commitments. We will establish a deadline of 30 days for ruling on motions for access under 49 CFR 1121, 1150 and 1180 (relating to new interchange commitments). Our establishment of a deadline on the Board requires that we also establish a deadline for parties to file replies to motions for access. We will adopt a deadline of 5 days from the date of filing of a motion for access for the filing of a reply.

Marshall Durbin asks the Board to establish a 10-day time limit for producing an agreement after the Board grants a motion for access to an interchange commitment document. We will require parties to produce the relevant documents within 5 days of receipt of a Board approved, signed confidentiality agreement.⁹

We will not impose these same deadlines for motions for access filed under our proposed 49 CFR 1114.30 (complaints or petitions involving existing interchange commitments), other than for replies to a motion for access. The deadlines that we are establishing are appropriate for our expedited class exemption or individual exemption processes, which are typically concluded

⁸ In STB Ex Parte No. 575, some rail carrier parties argued that interchange commitments have been granted in return for low purchase prices or rentals and that any attempt to undo such bargains retroactively would be unlawful, would disrupt existing business relationships, and would deter beneficial future transactions.

⁹ Standard Board procedure is to issue a decision allowing or requiring disclosure subject to protective conditions and confidentiality agreement forms (to be signed) that are attached to the decision as appendices.

within a short time frame. In contrast, where the transaction has already become effective, the Board's normal procedures for considering motions are generally sufficient. However, we will modify our proposed rule 1114.30(d) to allow parties 5 days (rather than 10) to reply to a motion for access, because we see no reason why such replies should be given more time in cases involving existing interchange commitments than in cases involving new interchange commitments.

Future Review of Rules. ASLRRRA asks us to commit to a full review of the effects of these rules on the industry and shippers after the rules have been in effect for a reasonable period of time. It would be premature to commit now to a review of the rules within a set period of time, because we currently have no reason to believe that they will be difficult to administer or will lead to problems. The Board always retains discretion to reconsider its regulations, and parties may seek such a review once there has been sufficient experience under the new rules.

Paperwork Reduction Act. In our notice published in the Federal Register on November 2, 2007, we described the proposed collection of information on interchange commitments, and we noted that we had submitted this information to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act (PRA), 44 U.S.C. 3507(d) and OMB regulations at 5 CFR 1320.11.

By notice dated January 10, 2008, OMB preapproved the collection of information proposed in this decision. This collection has been assigned OMB Control No. 2140-0016. Unless renewed, OMB approval expires on January 31, 2011. The display of a currently valid OMB control number for this collection is required by law. Under the PRA and 5 CFR 1320.8, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

In our notice published in the Federal Register on November 2, 2007, we specifically sought comments on the proposed collection regarding: (1) whether the particular collection of information described above is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate.

Except as noted above, the comments received in response to our notice give us no reason to modify the regulations as proposed. In the above discussion, we have addressed arguments that the disclosure of interchange commitments that we are seeking is more extensive than necessary, or not extensive enough, for proper performance of our statutory functions. No party

has challenged our burden estimates or proposed a way to further minimize the burden on respondents from collection of the information¹⁰ and still provide the required information.

Pursuant to 5 U.S.C. 605(b), we reaffirm our finding in the Federal Register on November 2, 2007, that our action in this proceeding will not have a significant impact on a substantial number of small entities.

It is ordered:

1. Marshall Durbin's request to file a reply to the comments of KCS is granted.
2. The rules in the Appendix are adopted and will be published in the Federal Register.
3. This decision is effective on June 29, 2008.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary

¹⁰ In the discussion pertaining to small entities in our notice published on November 2, 2007, we explained why the burden of collection would be minimal. No party has disputed our explanation.

APPENDIX

For the reasons set forth in the preamble, parts 1114, 1121, 1150, and 1180, of title 49, chapter X, of the Code of Federal Regulations are amended as follows:

PART 1114 – EVIDENCE; DISCOVERY

- 1. The authority citation for part 1114 continues to read as follows:
Authority: 5 U.S.C. 559; 49 U.S.C. 721.
- 2. Amend § 1114.30 by adding paragraph (d) to read as follows:

§ 1114.30 Production of documents and records and entry upon land for inspection and other purposes.

* * * * *

(d) Agreements containing interchange commitments. In any proceeding involving the reasonableness of provisions related to an existing rail carrier sale or lease agreement that serve to induce a party to the agreement to interchange traffic with another party to the agreement, rather than with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means, a party to the proceeding with a need for the information may obtain a confidential, complete version of the agreement, with the prior approval of the Board. The party seeking such approval must file an appropriate motion containing an explanation of the party’s need for the information and a draft protective order and undertaking(s) that will ensure that the agreement is kept confidential. The motion seeking approval may be filed at any time after the initial complaint or petition, including before the answer to the complaint or petition is due. A reply to such a motion must be filed within 5 days thereafter. The motion will be considered by the Board in an expedited manner.

PART 1121 – RAIL EXEMPTION PROCEDURES

- 3. The authority citation for part 1121 continues to read as follows:
Authority: 49 U.S.C. 10502 and 10704.
- 4. Amend § 1121.3 by adding paragraph (d) to read as follows:

§ 1121.3 Content.

* * * * *

(d) Transactions imposing interchange commitments. (1) If a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the

purchase price or rental, positive economic inducement, or other means (“interchange commitment”), the following additional information must be provided:

(i) The existence of that provision or agreement and identification of the affected interchange points; and

(ii) A confidential, complete version of the document(s) containing or addressing that provision or agreement, which may be filed with the Board under 49 CFR 1104.14(a) and will be kept confidential without need for the filing of an accompanying motion for a protective order under 49 CFR 1104.14(b).

(2) To obtain information about an interchange commitment for use in a proceeding before the Board, a shipper or other affected party may be granted access to the confidential documents filed pursuant to paragraph (d)(1) of this section by filing, and serving upon the petitioner, a “Motion for Access to Confidential Documents,” containing:

(i) An explanation of the party’s need for the information; and

(ii) An appropriate draft protective order and confidentiality undertaking(s) that will ensure that the documents are kept confidential.

(3) Deadlines.

(i) Replies to a Motion for Access are due within 5 days after the motion is filed.

(ii) The Board will rule on a Motion for Access within 30 days after the motion is filed.

(iii) Parties must produce the relevant documents within 5 days of receipt of a Board approved, signed confidentiality agreement.

PART 1150 – CERTIFICATE TO CONSTRUCT, ACQUIRE, OR OPERATE RAILROAD LINES

5. The authority citation for part 1150 continues to read as follows:

Authority: 49 U.S.C. 721(a), 10502, 10901, and 10902.

6. Amend § 1150.33 by adding paragraph (h) to read as follows:

§ 1150.33 Information to be contained in notice – transactions that involve creation of Class III carriers.

* * * * *

(h) Transactions imposing interchange commitments. (1) If a proposed acquisition or operation of a rail line or change of operators involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car

penalty, adjustment in the purchase price or rental, positive economic inducement, or other means (“interchange commitment”), the following additional information must be provided:

(i) The existence of that provision or agreement and identification of the affected interchange points; and

(ii) A confidential, complete version of the document(s) containing or addressing that provision or agreement, which may be filed with the Board under 49 CFR 1104.14(a) and will be kept confidential without need for the filing of an accompanying motion for a protective order under 49 CFR 1104.14(b).

(2) To obtain information about an interchange commitment for use in a proceeding before the Board, a shipper or other affected party may be granted access to the confidential documents filed pursuant to paragraph (h)(1) of this section by filing, and serving upon the petitioner, a “Motion for Access to Confidential Documents,” containing:

(i) An explanation of the party’s need for the information; and

(ii) An appropriate draft protective order and confidentiality undertaking(s) that will ensure that the documents are kept confidential.

(3) Deadlines.

(i) Replies to a Motion for Access are due within 5 days after the motion is filed.

(ii) The Board will rule on a Motion for Access within 30 days after the motion is filed.

(iii) Parties must produce the relevant documents within 5 days of receipt of a Board approved, signed confidentiality agreement.

7. Amend § 1150.43 by adding paragraph (h) to read as follows:

§ 1150.43 Information to be contained in notice for small line acquisitions.

* * * * *

(h) Transactions imposing interchange commitments. (1) If a proposed acquisition or operation of a rail line or change of operators involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means (“interchange commitment”), the following additional information must be provided:

(i) The existence of that provision or agreement and identification of the affected interchange points; and

(ii) A confidential, complete version of the document(s) containing or addressing that provision or agreement, which may be filed with the Board under 49 CFR 1104.14(a) and will be kept confidential without need for the filing of an accompanying motion for a protective order under 49 CFR 1104.14(b).

(2) To obtain information about an interchange commitment for use in a proceeding before the Board, a shipper or other affected party may be granted access to the confidential documents filed pursuant to paragraph (h)(1) of this section by filing, and serving upon the petitioner, a “Motion for Access to Confidential Documents,” containing:

(i) An explanation of the party’s need for the information; and

(ii) An appropriate draft protective order and confidentiality undertaking(s) that will ensure that the documents are kept confidential.

(3) Deadlines.

(i) Replies to a Motion for Access are due within 5 days after the motion is filed.

(ii) The Board will rule on a Motion for Access within 30 days after the motion is filed.

(iii) Parties must produce the relevant documents within 5 days of receipt of a Board approved, signed confidentiality agreement.

PART 1180 – RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION PROJECT, TRACKAGE RIGHTS, AND LEASE PROCEDURES

8. The authority citation for part 1180 continues to read as follows:

Authority: 5 U.S.C. 553 and 559; 11 U.S.C. 1172; 49 U.S.C. 721, 10502, 11323–11325.

9. Amend § 1180.4 by adding paragraph (g)(4) to read as follows:

§ 1180.4 Procedures.

(g) *Notice of exemption.* * * *

(4) Transactions imposing interchange commitments. (i) If a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means (“interchange commitment”), the following additional information must be provided:

(A) The existence of that provision or agreement and identification of the affected interchange points; and

(B) A confidential, complete version of the document(s) containing or addressing that provision or agreement, which may be filed with the Board under 49 CFR 1104.14(a) and will be kept confidential without need for the filing of an accompanying motion for a protective order under 49 CFR 1104.14(b).

(ii) To obtain information about an interchange commitment for use in a proceeding before the Board, a shipper or other affected party may be granted access to the confidential documents filed pursuant to §1180.4(g)(4)(i) of this section by filing, and serving upon the petitioner, a “Motion for Access to Confidential Documents,” containing:

(A) An explanation of the party’s need for the information; and

(B) An appropriate draft protective order and confidentiality undertaking(s) that will ensure that the documents are kept confidential.

(iii) Deadlines.

(A) Replies to a Motion for Access are due within 5 days after the motion is filed.

(B) The Board will rule on a Motion for Access within 30 days after the motion is filed.

(C) Parties must produce the relevant documents within 5 days of receipt of a Board approved, signed confidentiality agreement.